

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BENJAMIN SOMERLOTT,

Plaintiff,

v.

McNEILUS TRUCK AND MANUFACTURING,  
INC.,

Defendant.

NO. 2:16-CV-00789-RAJ

DEFENDANT McNEILUS TRUCK AND  
MANUFACTURING, INC.'S ANSWER  
TO PLAINTIFF'S UNVERIFIED  
COMPLAINT

TO THE COURT, ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF  
RECORD:

Defendant McNEILUS TRUCK AND MANUFACTURING, INC. ("MTM"), by and  
through its attorneys of record, submits its Answer and Affirmative Defenses to the unverified  
First Amended Complaint ("FAC") of Plaintiff BENJAMIN SOMERLOTT ("Plaintiff").  
MTM answers for itself and no other Defendants, and hereby admits, denies, and alleges as  
follows:

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{00058089 }DEFENDANT McNEILUS TRUCK AND  
MANUFACTURING, INC.'S ANSWER TO PLAINTIFF'S  
UNVERIFIED COMPLAINT- 1  
( 2:16-CV-00789-RAJ)

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Irvine, California 92612  
949.390.6500

I.

**PARTIES**

1.01 Answering paragraph 1.01 of the FAC, MTM is without sufficient information to admit or deny these allegations.

1.02 Answering paragraph 1.02 of the FAC, MTM admits the allegations in this paragraph.

II.

**JURISDICTION AND VENUE**

2.01 Answering paragraph 2.01 of the FAC, MTM is without sufficient information to admit or deny these allegations.

2.02 Answering paragraph 2.02 of the FAC, MTM admits that it is a citizen of the state of Minnesota and has a principal place of business in Dodge Center, Minnesota. MTM is without sufficient information to admit or deny the remainder of the allegations.

2.03 Answering paragraph 2.03 of the FAC, MTM admits the allegations in this paragraph.

2.04 Answering paragraph 2.04 of the FAC, MTM is without sufficient information to admit or deny these allegations.

2.05 Answering paragraph 2.05 of the FAC, MTM is without sufficient information to admit or deny these allegations.

III.

**FACTS**

3.01 Answering paragraph 3.01 of the FAC, MTM admits that the McNeilus Model 2644 truck with serial number 122SOX264430147 ("the Truck") was designed, tested, manufacture, assembled, marketed, and sold by Defendant MTM. As to the remainder of the

1 allegations in said paragraph, MTM is without sufficient information to admit or deny these  
2 allegations.

3 3.02 Answering paragraph 3.02 of the FAC, MTM is without sufficient information  
4 to admit or deny these allegations.

5 3.03 Answering paragraph 3.03 of the FAC, MTM denies these allegations.

6 IV.

7 **STRICT PRODUCTS LIABILITY AND NEGLIGENCE**

8 4.01 Answering paragraph 4.01 of the FAC, MTM admits that the McNeilus Model  
9 2644 Truck with serial number 122SOX264430147 was designed, tested, manufacture,  
10 assembled, marketed, and sold by Defendant MTM and that MTM placed the Truck into the  
11 stream of commerce. MTM denies the remainder of the allegations of this paragraph.

12 4.02 Answering paragraph 4.02 of the FAC, MTM is without sufficient information  
13 to admit or deny these allegations.

14 4.03 Answering paragraph 4.03 of the FAC, MTM is without sufficient information  
15 to admit or deny these allegations.

16 4.04 Answering paragraph 4.04 of the FAC, MTM denies these allegations.

17 4.05 Answering paragraph 4.05 of the FAC, MTM denies these allegations.

18 4.06 Answering paragraph 4.06 of the FAC, MTM denies these allegations.

19 4.07 Answering paragraph 4.07 of the FAC, MTM admits that it has a duty to  
20 manufacture, distribute and sell products that are not unreasonably dangerous. MTM denies  
21 the remainder of the allegations in this paragraph.

22 V.

23 **BREACH OF IMPLIED WARRANTY**

24 5.01 Answering paragraph 5.01 of the FAC, MTM admits that the Truck was not  
25 defective, was not unreasonably dangerous, and had been designed, manufactured, marketed,

1 constructed and assembled in a good and workmanlike manner and was fit and safe for the  
2 purposes for which it was intended. MTM denies the remaining allegations in this paragraph.

3 5.02 Answering paragraph 5.02 of the FAC, MTM denies these allegations.

4 **VI.**

5 **DAMAGES**

6 6.01 Answering paragraph 6.01 of the FAC, MTM denies these allegations.

7 6.02 Answering paragraph 6.02 of the FAC, MTM denies these allegations.

8 **VII.**

9 **PRE-JUDGMENT AND POST-JUDGMENT INTEREST**

10 7.01 Answering paragraph 7.01 of the FAC, MTM denies these allegations.

11  
12 **DEMAND FOR JURY TRIAL**

13 MTM demands a jury trial as to all matters so triable.

14 **AFFIRMATIVE DEFENSES**

15 **FIRST AFFIRMATIVE DEFENSE**

16 The FAC, and each separate cause of action alleged in it, fails to state facts sufficient to  
17 constitute a cause of action against MTM.

18 **SECOND AFFIRMATIVE DEFENSE**

19 MTM is informed and believes and on that basis alleges that any injuries or damages  
20 sustained by Plaintiff were caused or contributed to by the negligence or other wrongful  
21 conduct of persons, firms, partnerships, corporations, municipalities, or entities other than  
22 MTM and that said negligence or other wrongful conduct comparatively reduces the  
23 percentage of negligence or other liability, if any, of MTM.

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**THIRD AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that the injuries and damages of Plaintiff, if any, were directly and proximately caused by the superseding, intervening acts and omissions of a third party or third parties for which MTM is neither responsible nor liable.

**FOURTH AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that the damages and injuries of Plaintiff, if any, were legally and proximately caused or contributed to by the negligence, fault, negligence per se, assumption of risk, and other culpable conduct of Plaintiff, and that the amount of damages, if any, that Plaintiff may recover against MTM must be diminished in the proportion that such conduct contributed to the alleged injuries, losses or damages of Plaintiff.

**FIFTH AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that the damages and injuries of Plaintiff, if any, were legally and proximately caused by the substantial alteration or modification, by a person or entity other than MTM, of the subject product described in the FAC as "McNeilus Model 2644 Truck with serial number 122SOX264430147.

**SIXTH AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that the damages and injuries of Plaintiff, if any, were legally and proximately caused by the unforeseeable and improper use and/or maintenance of the Truck.

**SEVENTH AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that the damages and injuries of Plaintiff, if any, were legally and proximately caused by, and arose out of, risks of which Plaintiff had both knowledge and understanding and that Plaintiff voluntarily assumed in the manner described in the FAC.

**EIGHTH AFFIRMATIVE DEFENSE**

1 MTM is informed and believes and on that basis alleges that Plaintiff's damages and  
2 injuries, if any, were legally and proximately caused by, and arose out of, Plaintiff's primary  
3 assumption of the risk.

4 **NINTH AFFIRMATIVE DEFENSE**

5 MTM is informed and believes and on that basis alleges that Plaintiff failed to mitigate  
6 his damages, if any, to the extent required by law.

7 **TENTH AFFIRMATIVE DEFENSE**

8 MTM is informed and believes and on that basis alleges that, if there is any  
9 comparative fault attributed to individuals or entities other than MTM, then this percentage of  
10 fault comparatively reduces the non-economic damages, if any, that Plaintiff can recover from  
11 MTM.

12 **ELEVENTH AFFIRMATIVE DEFENSE**

13 MTM is informed and believes and on that basis alleges that the FAC, and each  
14 separate cause of action alleged in it against MTM, is barred by the applicable statute of  
15 limitations.

16 **TWELVETH AFFIRMATIVE DEFENSE**

17 MTM is informed and believes and on that basis alleges that the claims contained in the  
18 FAC are barred by a prior settlement and/or release of all claims.

19 **THIRTEENTH AFFIRMATIVE DEFENSE**

20 MTM is informed and believes and on that basis alleges that Plaintiff is precluded from  
21 proceeding against MTM by reason of his negligent or otherwise wrongful failure to preserve  
22 or to cause others to preserve evidence relating to the incident that forms the subject matter of  
23 this action, including but not limited to the Truck, to the prejudice of MTM.

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**FOURTEENTH AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that the Truck was not in the original condition at the time of the events, injuries, and damages alleged in the FAC as when it left the custody and control of MTM.

**FIFTEENTH AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that the FAC and each and every claim for relief alleged therein is barred by the equitable defenses of unclean hands, waiver, estoppel, and/or laches.

**SIXTEENTH AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that adequate warnings and instructions concerning the Truck were provided to persons in the chain of distribution, and, therefore, any duty to warn was discharged.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that it did not expressly or impliedly warrant to Plaintiff the Truck or warrant the Truck to Plaintiff for a particular purpose.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that Plaintiff failed to timely notify MTM of the alleged breach of an express or implied warranty that was made to him, if any, and therefore, he is barred from proceeding under any type of warranty theory against MTM.

**NINETEENTH AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that it was not in privity with Plaintiff, and, therefore, cannot be held liable to Plaintiff for breach of any warranty, express or implied.

**TWENTIETH AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges that Plaintiff's FAC is barred by the exclusivity provisions of the Industrial Insurance Act, including, but not limited to, Title 51 RCW *et seq.*

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

MTM alleges that to the extent Plaintiff herein recovered, or in the future may recover, any monies in connection with any claim for workers' compensation benefits, any amounts recovered in this action are subject to a claim by MTM for a credit or offset.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

MTM is informed and believes and on that basis alleges the injuries and damages sustained by Plaintiff, if any, were legally and proximately caused by the intentional and willful misconduct of other persons and entities. This intentional and willful misconduct was an unforeseeable intervening act for which MTM is not responsible or liable.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred because the Truck, as designed, manufactured, and sold complied with all applicable statutes, rules, and regulations.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

MTM reserves the right to amend its answer to assert further affirmative defenses that are not presently known but may become known and available through further investigation and discovery.

**PRAYER**

WHEREFORE, MTM prays as follows:

1. For dismissal of Plaintiff's unverified FAC with prejudice;
2. For a judgment in favor of MTM and against Plaintiff;
3. For costs of suit incurred herein; and



4. For such other and further relief as the Court may deem just and proper.

DATED this 10<sup>th</sup> day of October, 2016.

TAYLOR | ANDERSON LLP

By Elizabeth V. McNulty

Elizabeth V. McNulty, CA Bar No. 192455  
*Pro Hac Vice*

Vanessa C. Whirl, Bar No. 50278

Attorneys for Defendant

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following parties:

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*Attorney for Plaintiff Benjamin Somerlott*

☒ Via CM/ECF

Signed at Irvine, California this 10 day of October, 2016.

  
Chelsea Huniu